

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAR 31 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of Closed Captioning and Video)
Description of Video Programming)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
Video Programming Accessibility)

MM Docket No. 95-176

REPLY COMMENTS

**THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.**

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

Its Attorneys

Of Counsel:
Andrew Krieg, Esq.
The Wireless Cable Association International, Inc.
1140 Connecticut Ave., NW, Suite 810
Washington, DC 20036
(202) 452-7823

March 31, 1997

No. of Copies rec'd
List ABCDE

0211

TABLE OF CONTENTS

TABLE OF CONTENTS	i
EXECUTIVE SUMMARY	ii
I. INTRODUCTION.....	1
II. ANY ENFORCEMENT MECHANISM ADOPTED BY THE COMMISSION IN THIS PROCEEDING MUST IMPOSE THE OBLIGATION FOR CAPTIONING ON PROGRAM OWNERS.	3
III. THE COMMISSION SHOULD ADOPT TRANSITION AND OTHER ENFORCEMENT RULES WHICH MINIMIZE THE ECONOMIC, TECHNOLOGICAL AND LOGISTICAL BURDENS OF CAPTIONING ON PROGRAM OWNERS AND MVPDS.	10
IV. THE RECORD IN THIS PROCEEDING SUPPORTS A BLANKET EXEMPTION FOR ITFS PROGRAMMING.	15
V. THE COMMISSION SHOULD NOT IMPOSE ITS CLOSED CAPTIONING REQUIREMENTS ON INTERNET SERVICES PROVIDED BY MVPDS.	16
VI. CONCLUSION.....	17

EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc., like many other commenting parties in this proceeding, continues to support the adoption of closed captioning rules that will maximize the availability of captioned programming to hearing-impaired viewers in the most efficient, economical manner possible. Thus far, Congress, the Commission and a large number of commenting parties agree that it is most efficient to insert closed captioning at the time of program production rather than to have multichannel video programming distributors (“MVPDs”) insert captions just before the programming is delivered to subscribers. Any regulatory framework for closed captioning should be constructed around this fundamental principle.

Moreover, notwithstanding the objections of certain parties who wish to impose the captioning obligation on MVPDs under the pretext that the MVPD is the “final link” to the subscriber, the record clearly reflects that MVPDs are very poorly equipped to remedy any shortfalls in captioning. For instance, even putting aside the significant technical obstacles to MVPD-added captioning, a number of parties have pointed out that MVPD-added captioning raises serious copyright problems which may expose MVPDs to substantial statutory penalties for infringement. Comments submitted by MVPDs and programmers alike also reflect that economic considerations or existing contractual obligations often preclude an MVPD from simply refusing to purchase popular cable network programming that is uncaptioned. Simply stated, the record demonstrates that the program owner is the entity best equipped to ensure that programming is captioned as required under the Commission’s rules.

WCA further submits that the Commission’s rules must be designed in a manner that ensures a smooth transition from a voluntary to a mandatory captioning scheme. Accordingly, WCA herein recommends that the Commission adopt a ten-year transition period (with no complaints permitted during the first three years) and allow for *de minimis* exceptions where the program owner has attempted to comply with the rules in good faith. Further, to ensure that wireless cable operators and other alternative MVPDs have unimpeded access to popular cable network programming, WCA requests that the Commission apply its captioning benchmarks on a channel-by-channel basis. WCA also believes that the public interest would be served by requiring subscribers to provide prior written notice of their complaints to encourage informal dispute resolution; expanding the existing contracts exemption to include contracts that do not require the program supplier to include captions or which do not authorize or require the MVPD to caption or modify program content in any manner; and applying all case-by-case exemptions for specific programs to all MVPDs.

Finally, WCA submits that there is no legal or policy basis for the Commission to apply its closed captioning rules to Internet services. Such action would be entirely inconsistent with the Commission’s definition of “video programming” and would greatly undermine the wireless cable industry’s ability to introduce wireless Internet access service to the public.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

)	
In the Matter of Closed Captioning and Video)	
Description of Video Programming)	
)	
Implementation of Section 305 of the)	MM Docket No. 95-176
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments with respect to the *Notice of Proposed Rulemaking* ("NPRM") issued in the above-captioned proceeding.^{1/}

I. INTRODUCTION.

The record in this proceeding reflects that WCA, along with a variety of multichannel video programming distributors ("MVPDs"), programmers and public interest groups, fully supports the adoption of rules that will increase the availability of captioned programming in the most efficient manner possible. There also is nearly universal agreement among Congress, the Commission and commenting parties that closed captioning should be inserted by program owners or producers at the time of program production, and that it makes no economic or technological sense to have MVPDs insert captioning just before programming is distributed to

^{1/} FCC 97-4 (rel. January 17, 1997).

subscribers. In effect, then, the issue of who logically should perform the captioning function has already been resolved. What remains, however, is the question of enforcement, *i.e.*, which entity in the video distribution chain is best positioned to ensure that the Commission's captioning rules are observed.

WCA and a substantial number of other parties have asked the Commission to impose the legal obligation for captioning on the entity closest to the production process, *i.e.*, the program owner or, alternatively, the program producer. Notwithstanding the objections of certain parties who wish to impose the obligation on MVPDs under the pretext that the MVPD is the "final link" to the subscriber, the record clearly reflects that MVPDs are very poorly equipped to remedy any shortfalls in captioned programming, since they are not in a position to caption programming themselves or force program suppliers to supply the required captioning for them. Moreover, the record also reflects that maintenance of an MVPD-based enforcement system will require a substantial duplication of effort by the Commission's staff and will do nothing but increase the costs of compliance for program owners and MVPDs alike. As a result, WCA reiterates that program owners should be the focus of the Commission's enforcement efforts in this area.

WCA also submits that the Commission must adopt rules that allow program owners and MVPDs sufficient time to transition from a voluntary to a mandatory captioning environment, and that otherwise minimize the economic, technical and logistical burdens of captioning. Specifically, WCA recommends that the Commission (1) adopt a ten-year transition period for compliance and accept no captioning complaints for the first three years thereof; (2) apply a "*de minimis*" exception to its captioning benchmarks that excludes program owners who have

attempted to comply with the Commission's Rules in good faith; (3) calculate compliance with its captioning benchmarks on a channel-by-channel basis; (4) apply the statutory exception for existing contracts to all contracts that do not require the program supplier to provide captions or which do not authorize or require the MVPD to caption or modify program content in any respect; (5) require subscribers to give prior written notice of potential captioning complaints to facilitate informal resolution of disputes; (6) mandate that all captioning complaints regarding television broadcast programming be directed to television broadcast stations; and (7) declare that any case-by-case exemptions from its closed captioning rules will apply automatically to all MVPDs which carry the exempted programming.

Finally, WCA notes that there is substantial evidence in the record which supports a blanket exemption for ITFS programming. However, for the reasons set forth herein, WCA strongly opposes any suggestion that the Commission's closed captioning rules should be applied to Internet services.

II. ANY ENFORCEMENT MECHANISM ADOPTED BY THE COMMISSION IN THIS PROCEEDING MUST IMPOSE THE OBLIGATION FOR CAPTIONING ON PROGRAM OWNERS.

Congress and the Commission have already agreed that it is more economical and efficient to insert closed captioning into video programming at the production stage and distribute it with captions than to have each multichannel video programming distributor ("MVPD") add the captions just before the programming is delivered to subscribers.^{2/} A substantial number of commenting parties in this proceeding have taken the same view, and thus have urged the

^{2/} H.R. Rep. 104-204, 104th Cong., 1st Sess. at 114 (1995) ("House Report"); *NPRM* at ¶ 6.

Commission to take the next logical step and impose captioning obligations on the entity closest to the production process, i.e., the program owner or, alternatively, the program producer.^{3/} Nonetheless, a few parties have insisted that the Commission should impose the captioning obligations on MVPDs, notwithstanding the fact that MVPDs generally do not produce *any* programming and otherwise have nothing whatsoever to do with the captioning process.^{4/} For the reasons set forth below, WCA respectfully disagrees.

^{3/} See, e.g., Comments of The Wireless Cable Association International, Inc., MM Docket No. 95-176, at 3-6 (filed Feb. 28, 1997) [the "WCA Comments"]; Comments of BellSouth Corporation *et al.*, MM Docket No. 95-176, at 7-14 (filed Feb. 28, 1997) [the "BellSouth Comments"]; Comments of Cox Enterprises, Inc., MM Docket No. 95-176, at 3-8 (filed Feb. 28, 1997); Comments of the National Association of Broadcasters, MM Docket No. 95-176, at 1-3 (filed Feb. 28, 1997) [the "NAB Comments"]; Comments of PrimeStar Partners, L.P., MM Docket No. 95-176, at 3-4 (filed Feb. 28, 1997) [the "PrimeStar Comments"]; Comments of Satellite Distributors Cooperative, MM Docket No. 95-176, at 2-3 (filed Feb. 28, 1997) [the "SDC Comments"]; Comments of United Video Satellite Group, MM Docket No. 95-176, at 2-4 (filed Feb. 28, 1997) [the "United Video Comments"]; Comments of the Satellite Broadcasting and Communications Association of America, MM Docket No. 95-176, at 2-6 (filed Feb. 28, 1997) [the "SBCA Comments"]; Comments of DIRECTV, Inc., MM Docket No. 95-176, at 3-6 (filed Feb. 28, 1997); Comments of AlphaStar Television Network, MM Docket No. 95-176, at 5-9 (filed Feb. 28, 1997) [the "AlphaStar Comments"]; Comments of Ameritech New Media, MM Docket No. 95-176, at 5-6 (filed Feb. 28, 1997) [the "Ameritech Comments"]; Comments of Paxson Communications Corporation, MM Docket No. 95-176, at 3-5 (filed Feb. 28, 1997); Comments of SBC Communications *et al.*, MM Docket No. 95-176, at 2-3 (filed Feb. 28, 1997); Comments of United States Satellite Broadcasting Company, Inc., MM Docket No. 95-176, at 5-8 (filed Feb. 28, 1997) [the "USSB Comments"]; Comments of U S WEST, Inc., MM Docket No. 95-176, at 9-12 (filed Feb. 28, 1997) [the "U S WEST Comments"].

^{4/} See, e.g., Comments of the Motion Picture Association of America, MM Docket No. 95-176, at 2-6 (filed Feb. 28, 1997) [the "MPAA Comments"]; Comments of WGBH Educational Foundation, MM Docket No. 95-176, at 3 (filed Feb. 28, 1997); Comments of Consumer Action Network, MM Docket No. 95-176, at 2-3 (filed Feb. 28, 1997); Comments of the League for the Hard of Hearing, MM Docket No. 95-176, at 3 (filed Feb. 28, 1997); Comments of the National Association of the Deaf, MM Docket No. 95-176, at 2-3 (filed Feb. 28, 1997) [the "NAD Comments"].

At the outset WCA wishes to reemphasize that the plain language of the 1996 Telecom Act clearly provides the Commission with the necessary jurisdiction to impose captioning obligations on program owners. With respect to new programming, the statute authorizes the Commission to exempt by regulation programs, classes of programs or services where the provision of closed captioning would be economically burdensome to the “provider *or owner* of such programming.”^{5/} Similarly, Congress authorized the Commission to ensure that video programming or *owners* maximize the availability of library programming.^{6/} Moreover, the statute’s provisions regarding preexisting contracts and case-by-case exemptions from the Commission’s closed captioning rules apply to program owners.^{7/} Congress’ repeated use of the term “owner” was not accidental; rather, it arises directly from Congress’s observation that it is most sensible to have programming captioned at the time of production by those entities most familiar with the program’s content, *prior to distribution by MVPDs*.^{8/} The unambiguous language of the statute and its legislative history puts to rest any suggestion that the Commission cannot exercise jurisdiction over program owners in this proceeding.

Moreover, any mechanism for enforcing the Commission’s closed captioning rules will not be effective unless the party against whom the rules are being enforced is in a position to remedy an alleged rule violation. The record in this proceeding establishes that MVPDs have no

^{5/} 47 U.S.C. § 613(d)(1) (emphasis added).

^{6/} 47 U.S.C. § 613(b)(2).

^{7/} 47 U.S.C. § 613(d)(2)-(3).

^{8/} House Report at 114.

role in the captioning process and that it makes no technological or economic sense to require MVPDs to caption video programming. In addition, a number of commenting parties have noted that MVPD-added captioning raises serious copyright problems which may expose MVPDs to substantial statutory penalties for infringement.^{9/} In other words, the record reflects what Congress and the Commission have already recognized, *i.e.*, that MVPDs are very poorly suited to the task of captioning any programming that does not comply with the Commission's closed captioning rules.

Furthermore, the record substantially undercuts the Commission's theory that MVPDs can ensure compliance with the Commission's rules through private negotiations with program suppliers. Indeed, there is a considerable amount of evidence in this proceeding as to the substantial economic and technical burdens associated with captioning cable network programming. For example, the National Cable Television Association has stated that captioning all basic cable programming alone could cost anywhere from \$500-\$900 million per year and, as reflected in the comments submitted by newer programming services such as the Television Food Network, the Game Show Channel, and Outdoor Life *et al.*, the financial burden of captioning will be especially severe on start-up, "low penetration" cable networks which have smaller distribution than the television broadcast networks and the more entrenched cable

^{9/} See, e.g., USSB Comments at 1-3; United Video Comments at 3-4; SBCA Comments at 4-6; BellSouth Comments at 9 n.11; Comments of Bell Atlantic and NYNEX, MM Docket No. 95-176, at 5-6 (filed Feb.28, 1997).

programming services.^{10/} Furthermore, as demonstrated in the comments filed by specialized “niche” services such as the Home Shopping Network, Prevue Networks, C-SPAN, and the Weather Channel, captioning often is technically and/or logistically impractical for programmers who do not rely on full-length, prerecorded entertainment programs for content.^{11/} No amount of negotiation between MVPDs and programmers can change these basic marketplace realities. Accordingly, the Commission should not assume that program suppliers will ease the burden of compliance on MVPDs by negotiating to supply captioned programming in all or even most cases.

In addition, comments submitted by MVPDs and programmers indicate that in today’s competitive marketplace it is unrealistic to expect that MVPDs will ignore the demands of their subscribers and take the extreme measure of threatening programmers with noncarriage if they

^{10/} See, Comments of the National Cable Television Association, MM Docket No. 95-176, at 5-9 (filed Feb. 28, 1997) [the “NCTA Comments”]; Comments of the Television Food Network, MM Docket No. 95-176, at 2-3 (filed Feb. 28, 1997); Comments of The Game Show Network, MM Docket No. 95-176, at 2-8 (filed Feb. 28, 1997); Comments of Outdoor Life Network *et al.*, MM Docket No. 95-176, at 9-16 (filed Feb. 28, 1997); Comments of the A&E Television Networks *et al.*, MM Docket No. 95-176, 10-15 (filed Feb. 28, 1997) [the “A&E Comments”]. Comments submitted by the motion picture industry also suggest that the costs of captioning may be prohibitive for certain types of feature films. See Comments of Independent Video & Filmmakers, Redeemable Features and First Run Features, MM Docket No. 95-176, at 1-2 (filed Feb. 28, 1997).

^{11/} See, *e.g.*, Comments of HSN, Inc., MM Docket No. 95-176, at 4-9 (filed Feb. 28, 1997); Comments of Prevue Networks, MM Docket No. 95-176, at 3-8 (filed Feb. 28, 1997); Comments of C-SPAN, MM Docket No. 95-176, at 2-6 (filed Feb. 28, 1997); Comments of The Weather Channel, MM Docket No. 95-176, at 3-9 (filed Feb. 28, 1997); Comments of Access Television Network, MM Docket No. 95-176, at 3-5 (filed Feb. 28, 1997); Comments of E! Entertainment Television, Inc., MM Docket No. 95-176 at 2-3 (filed Feb. 28, 1997).

do not comply with the Commission's closed captioning rules.^{12/} The comments of Encore Media Corporation are instructive on this point:

Neither networks nor MVPDs can simply "refuse to purchase" a particular program depending on whether it is captioned or not. [C]ontracts between studios and programming networks are typically seven years or more in duration, as are contracts between program networks and MVPDs. To not accept a particular movie or program may mean either a breach of the long-term contract or a need to find other programming to fill a spot at considerable, duplicative expense. The *NPRM*'s simplistic assertion that an MVPD may simply "refuse to purchase" a particular uncaptioned program ignores the manner in which the marketplace actually operates.^{13/}

The record also reflects that even if an MVPD were to have the necessary leverage to require a program supplier to supply captioning as a condition of carriage, an MVPD cannot force the supplier to provide captioning where the supplier is not already contractually obligated to do so or where an existing contract does not authorize or require the MVPD to caption or modify program content.^{14/} WCA submits that there is no basis in the record nor any Commission precedent that would justify any requirement that MVPDs renegotiate existing programming contracts to require that program suppliers comply with the Commission's closed captioning rules.

^{12/} See, e.g., Comments of Encore Media Corporation, MM Docket No. 95-176, at 5-7 (filed Feb. 28, 1997) [the "Encore Comments"]; WCA Comments at 6-7; SDC Comments at 2-5; Ameritech Comments at 7; SBC Comments at 3-4.

^{13/} Encore Comments at 6.

^{14/} See, Encore Comments at 14-17; WCA Comments at 7; PrimeStar Comments at 3-4; SDC Comments at 3-6; Ameritech Comments at 10; USSB Comments at 10-14.

In sum, the record demonstrates that MVPDs are not the appropriate focal point for enforcement of the Commission's closed captioning rules, since they are not in a position to caption programming themselves or indirectly impose the captioning obligation on program suppliers through private negotiation or explicit threats of noncarriage, particularly where existing contractual obligations require programming to be carried whether it is captioned or not. Furthermore, the Commission cannot in fairness to subscribers require MVPDs to drop noncaptioned programming until the program owner supplies the required captions. Thus, WCA once again submits that the best way to ensure effective enforcement of the Commission's closed captioning rules is to impose legal responsibility for captioning on the program owner, which is the entity encompassed by the 1996 Telecom Act that is most familiar with the economic and technical issues associated with captioning and is best positioned to remedy any shortfalls in captioned programming.^{15/}

^{15/} MPAA acknowledges that "it is generally not difficult to identify the ultimate 'owner' of a program" MPAA Comments at 3. Nonetheless, MPAA argues that MVPDs should bear legal responsibility for captioning, on the theory that a program owner may license distribution rights to different entities for various time periods and geographic regions. *Id.* Since program owners will have entered into written contracts with their distributors and presumably will know who those distributors are, a program owner is in a far better position than an MVPD to identify those entities and hold them accountable for failing to observe the Commission's closed captioning rules. Further, imposing legal responsibility for captioning on MVPDs will likely require the Commission to resolve large numbers of duplicative complaints against potentially thousands of MVPDs *for a single program*. By contrast, an owner-based enforcement system will permit the Commission to resolve all potential captioning complaints for a single program *once* simply by requiring the program owner to ensure that the program is captioned

III. THE COMMISSION SHOULD ADOPT TRANSITION AND OTHER ENFORCEMENT RULES WHICH MINIMIZE THE ECONOMIC, TECHNOLOGICAL AND LOGISTICAL BURDENS OF CAPTIONING ON PROGRAM OWNERS AND MVPDS.

Over the past twenty years captioned programming has been provided through the voluntary efforts of program producers and providers, and as a result of these efforts producers are captioning significant amounts of nationally distributed programming and some local or regional programming.^{16/} Funding provided by the Department of Education represents approximately 40% of the cost of all captioned video programming; however, DOE funding is available only for programming that reaches large audiences.^{17/} The remaining support comes from a combination of directly credited corporate advertising support, charitable and foundation support and producers and distributors.^{18/} By shifting to a mandatory as opposed to a voluntary captioning system no later than the August 8, 1997 deadline imposed by Congress, the Commission will be requiring that programming be captioned as a matter of law even though the economic and technical resources which the market currently devotes to captioning will not have changed to any significant extent. WCA thus submits that any transition or other enforcement rules adopted in this proceeding must be crafted to give program owners and MVPDs sufficient time to adjust to the new regulatory regime in a manner which increases the level of captioned programming over a reasonable period of time, without imposing undue economic burdens or

^{16/} *NPRM* at ¶¶ 10-12.

^{17/} *Id.* at ¶10.

^{18/} *Id.*

interfering with the marketplace and technological forces which have increased the overall level of captioned programming *without* Commission oversight.^{19/}

Accordingly, as suggested by a number of programmers and MVPDs in this proceeding, the Commission should adopt the ten-year "phase-in" period proposed in the *NPRM*, which under the Commission's proposal would require that 25% of all new, non-exempt video programming must be captioned after three years, 50% after five years, 75% after seven years, and 100% after ten years.^{20/} However, given that a broad variety of programmers have provided substantial evidence as to why it is difficult to caption all video programming according to a fixed captioning "quota," the Commission should allow for a "*de minimis*" exception at each captioning benchmark that will exclude program owners who have otherwise made a good faith effort to caption as much of their programming as possible.^{21/} Also, the Commission should not accept

^{19/} See, e.g., A&E Comments at 20 ("The Act and the Commission's Notice both indicate that the timetable for compliance must be realistic in light of the marketplace and existing obligations. The current amount of captioning transmitted by broadcasting networks developed over a far longer period, was implemented generally with far greater resources operating in a very different market, and was supported to a large degree by government assistance."); Comments of Home Box Office, Inc., MM Docket No. 95-176, at 12-13 ("[T]he Commission should not create an artificial deadline for the captioning of particular types of programming. Marketplace forces have proven to be a significant motivator to the provision of closed captioning, and they will continue to be."); E! Comments at 3 ("Apart from the considerable financial burden that captioning will impose, there remain a number of practical difficulties. . . . In addition, technological breakthroughs may occur during the transition period, making new devices available to facilitate the captioning process.").

^{20/} See, e.g., C-SPAN Comments at 8; U S WEST Comments at 12-14; Ameritech Comments at 10; A&E Comments at 22-26.

^{21/} See, e.g., NCTA Comments at 9-13; E! Comments at 6-7; PrimeStar Comments at 6; C-SPAN Comments at 13; Comments of the Association of Local Television Stations, MM Docket No. 95-176, at 8-10 (filed Feb. 28, 1997).

any captioning complaints from subscribers during the first three years of the transition period, since no "minimum" captioning benchmark will be in force during that time.

Further, to ensure that wireless cable systems and other alternative MVPDs have full access to popular cable network programming, WCA recommends that the Commission apply its captioning benchmarks on a channel-by-channel basis rather than to an entire multichannel system as a whole. Even incumbent cable operators are concerned that a systemwide measurement will enable programmers to manipulate the Commission's captioning rules to their advantage. As noted by U S WEST:

[T]o apply the captioning measurement systemwide or on an aggregate channel basis could potentially distort negotiations between program producers and distributors. Particularly if the Commission decides to make the distributor responsible for compliance, it places an additional and potentially thorny issue on the negotiation table - - namely the percentage of closed captioning offered. In an extreme case such a rule might incent a stronger program producer to delay captioning, under the theory that the distributor will be forced to find other programmers to pick up the slack left by the non-captioning service.^{22/}

Clearly, the concerns enunciated by U S WEST apply with even greater force to alternative MVPDs which cannot offer a competitive multichannel service without unimpeded access to popular cable network programming.

Moreover, regardless of where the Commission chooses to impose the legal obligation for captioning, the Commission should require that a subscriber first notify the program owner or MVPD of a potential complaint and allow a reasonable period of time (*e.g.*, sixty days) for the

^{22/} U S WEST Comments at 15. *See also*, NCTA Comments at 14-16; Comments of CBS Inc., MM Docket No. 95-176, at 10-11 (filed Feb. 28, 1997).

program owner or MVPD to bring the programming into compliance with the rule or indicate why the programming in question does not have to be captioned under the Commission's Rules. The concept of a prior notice period is well established in the Commission's cable rules and serves the very useful function of allowing the parties to resolve potential complaints informally without straining the Commission's already overextended resources.^{23/} Furthermore, to prevent "shotgun" complaints directed at programs that are uncaptioned in isolated instances for reasons beyond the program owner's or the MVPD's control, the Commission should require that any closed captioning complaint be based on the program owner's or MVPD's programming over a period no less than one month.

Comments submitted by various parties also reflect that the Commission should amend its proposed "existing contracts" exception to encompass all contracts that either do not require the program supplier to provide captioning or which do not authorize or require the MVPD to caption or modify program content. As indicated in the comments submitted by Encore Media, a substantial number of programming contracts are structured in this fashion, and thus limiting the exception only to those contracts which affirmatively prohibit captioning will require programmers and MVPDs to renegotiate long standing contractual arrangements to incorporate compliance with the Commission's closed captioning rules.^{24/} Congress did not intend to disrupt

^{23/} See, e.g., 47 C.F.R. § 76.61 (requiring television broadcast stations to give cable systems thirty days prior notice of potential must-carry complaints).

^{24/} Encore Comments at 5-7, 14-16; WCA Comments at 7.

the marketplace in this manner, and the Commission should therefore modify its proposed rule accordingly.

Also, in light of the fact that a substantial amount of subscriber viewing still is directed toward television broadcast stations, and given that either by contract or regulation MVPDs are required to carry television broadcast signals “as is,” WCA submits that all complaints regarding captioning of television broadcast programming carried by an MVPD must be directed to the television station in question. If notwithstanding the record the Commission imposes the legal obligation for captioning on MVPDs rather than program owners, then under no circumstances should the Commission adopt NAB’s request that all MVPDs be required to carry television broadcast signals if broadcast programming is used to satisfy the MVPD’s captioning quota.^{25/} The Commission has no authority under the 1996 Telecom Act to use its closed captioning rulemaking as a “backdoor” mechanism for revisiting the must-carry issue; to the extent that NAB believes that all MVPDs should be required to carry local broadcast stations, they should take up the matter in a separate petition for rulemaking.

Finally, to minimize the paperwork burden on the Commission’s staff and lend some certainty to the Commission’s closed captioning rules, the Commission should declare that any “case-by-case” exemptions issued pursuant to Section 713(d)(3) of the 1996 Telecom Act will apply automatically to all MVPDs that carry the exempted programming. Otherwise, the Commission will be at risk of receiving hundreds of complaints about the same program where it has already determined that the program does not have to be captioned.

^{25/} NAB Comments at 6-7.

IV. THE RECORD IN THIS PROCEEDING SUPPORTS A BLANKET EXEMPTION FOR ITFS PROGRAMMING.

In its initial comments WCA noted that ITFS licensees do not properly fall within the Commission's definition of "video programming provider" and thus should be accorded a blanket exemption for all ITFS programming delivered over their facilities to ITFS receive sites.^{26/} WCA also noted that a similar exemption for ITFS programming delivered by wireless cable operators into subscriber homes is necessary to maximize ITFS distribution and preserve the critical relationship between the wireless cable industry and ITFS licensees. The strong support among ITFS licensees for these positions (both in their individual comments and in the comments of WCA) should be accorded considerable weight by the Commission, since ITFS licensees are most knowledgeable about their own economic circumstances, the nature of their ITFS service and whether there is even a need for ITFS programming to be captioned.^{27/} Moreover, the comments of the ITFS licensees demonstrate that a blanket exemption for ITFS programming is appropriate regardless of whether the Commission imposes the captioning obligation on video programming providers or program owners/producers. Accordingly, WCA once again submits that the Commission will best serve the needs of ITFS licensees and the hearing-impaired

^{26/} WCA Comments at 16-17.

^{27/} See, e.g., Comments of the Archdiocese of Los Angeles Education and Welfare Corporation *et al.*, MM Docket No. 95-176, at 2-7 (filed Feb. 28, 1997); Joint Comments of Higher Education Parties, MM Docket No. 95-176, at 4-5 (filed Feb. 28, 1997); Comments of The Catholic Television Network, MM Docket No. 95-176, at 4-8 (filed Feb. 28, 1997); Comments of Indiana Higher Education Telecommunications System, MM Docket No. 95-176, 5-7 (filed Feb. 28, 1997); Comments of the ITFS Parties, MM Docket No. 95-176, at 2-8 (filed Feb. 28, 1997); WCA Comments at 12-14.

community by allowing ITFS programming to be captioned on a case-by-case basis where a local educator or school board determines that such captioning is necessary to accommodate hearing-impaired students.

V. THE COMMISSION SHOULD NOT IMPOSE ITS CLOSED CAPTIONING REQUIREMENTS ON INTERNET SERVICES PROVIDED BY MVPDS.

A very small number of parties in this proceeding have suggested that the Commission should apply its closed captioning rules to Internet services.^{28/} There is no legal or public policy basis for the Commission to take such action. The Commission has yet to exercise jurisdiction over the content of Internet services, and nothing in the closed captioning provisions or legislative history of the 1996 Telecom Act authorizes the Commission to do so or even suggests that closed captioning of Internet services would serve the public interest. Indeed, the Communications Act of 1934, as amended, defines “video programming” as “programming provided by, or *generally considered comparable to programming provided by*, a television broadcast station.”^{29/} Internet services use two-way high speed data transmissions via copper/fiber optic wires or, more recently, microwave services to provide subscribers (as opposed to the general public) on-demand access to an infinite library of visual, textual and audio material unavailable via one-way transmission of off-air signals via television broadcast frequencies. As such, the information available over the Internet is not “comparable” to television broadcast programming.

In any event, as a practical matter it makes absolutely no sense to require MVPDs to

^{28/} See NAD Comments at 3; Comments of KALEIDOSCOPE Television, MM Docket No. 95-176, at 2-6 (filed Feb. 28, 1997).

^{29/} 47 U.S.C. § 522(20) (emphasis added).

caption material delivered over the Internet. Excluding situations where an MVPD operates its own "home page" (which usually consists of textual and graphic material that is fully accessible to hearing-impaired users), an MVPD which provides Internet access service has no control whatsoever of the vast amount of information delivered through the Internet and has no means to ensure that Internet material is captioned. Moreover, given the substantial economic, technical and logistical obstacles to captioning material in the far more limited domain of "video programming," any requirement that MVPDs caption unquantifiable streams of Internet material would be a death knell to the new high-speed Internet access services which the wireless cable industry is about to introduce to the public.^{30/} Such a result clearly does not serve the public interest.

VI. CONCLUSION.

WCA reiterates that the wireless cable industry is fully committed to maximizing the accessibility of closed captioned programming for hearing-impaired viewers, and to that end is

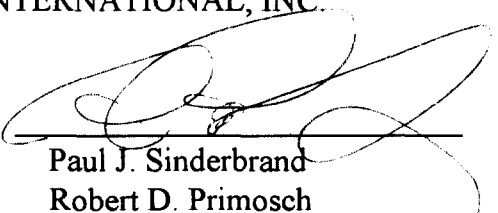
^{30/} It is a matter of public record that wireless cable operators are making substantial investments in researching and developing wireless Internet access services. *See, e.g.,* Barthold, "High-Speed Data Dominates Wireless Meeting," *Cable World*, at 58 (Feb. 24, 1997); "Winter Meeting: More and Better Access," *Wireless Cable Investor*, at 4-6 (Feb. 26, 1997); Breznick and Vittore, "Wireless Internet Access Gaining Steam," *Cable World*, at 26 (Oct. 31, 1996); "American Telecasting Teams with MCI," *Cable World*, at 2 (Oct. 31, 1996); "CAI Wireless High-Speed Access News," *Wireless Cable Investor*, at 2 (Oct. 31, 1996); "Wireless News," *Cable World*, at 30 (Oct. 28, 1996) ("CAI Wireless Inc. asked the FCC to approve two-way communications using its wireless cable channels in Hartford, Conn. Approval would let CAI use channels for high-speed Internet access . . ."). Indeed, WCA and over one hundred other parties have recently filed a Petition for Rulemaking with the Commission proposing new regulations that would permit routine two-way use of MDS and ITFS frequencies for this purpose. *See Amendment of Parts and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Petition for Rulemaking (filed Mar. 14, 1997).

already using equipment that passes closed captions through to subscribers intact. In adopting mandatory closed captioning requirements, however, the Commission must recognize that wireless cable operators and other MVPDs have no role in the captioning process itself and cannot either as a technical, economic or legal matter insert captioning themselves or require that programming be captioned prior to retransmission. Accordingly, WCA recommends that the focus of the Commission's enforcement efforts in this area must be on the program owner, and that the Commission should otherwise structure its rules as suggested above and in WCA's initial comments to ensure an efficient, economical transition to mandatory captioning.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By:



Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

Its Attorneys

Of Counsel:
Andrew Krieg, Esq.
The Wireless Cable Association International, Inc.
1140 Connecticut Ave., NW, Suite 810
Washington, DC 20036
(202) 452-7823

March 31, 1997